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IN THE

Supreme Court of the United States

October Term 1963

No. 322

JOHN COLBERT, CALVIN E. HERBERT, and ROBERT WALDEN,

Petitioners,

v.

PEERLESS CHEMICALS (P. R.) INC., and PEERLESS OIL & CHEMICAL CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners John Colbert, Calvin E. Herbert and Robert Walden respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Appendix A, pp. A1-4) affirming a judgment of the United States District Court, Southern District of New York, made and entered on September 19, 1961 (S. R. 116),* and a judgment of the United States District Court, Eastern District of New York, made and entered on May 22, 1962 (E. R. 337-338),* which judgments

* S. R. denotes the record in the Southern District and E. R. denotes the record in the Eastern District.

dismissed the complaint against respondent Peerless Chemicals (P. R.) Inc., a Puerto Rican corporation, for lack of jurisdictional contacts in a diversity action brought by longshoremen for a maritime tort. The actions by the other plaintiffs in the lower courts have been discontinued.

The Opinions of the Courts Below

The opinion of the District Court, Southern District of New York is unreported and set forth in Appendix A (p. A5). The opinion of the Distret Court, Eastern District of New York is reported in 216 F. Supp. 612 and set forth in Appendix A (p. A7). The opinion of the United States Court of Appeals is reported in 316 F. 2d 695 and set forth in Appendix A (p. A16).

Jurisdiction, Statutes and Constitutional Provisions Involved

The judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was made and entered April 15, 1963 (R. 45a and 47a) and on April 29, 1963 petitioners petitioned for a rehearing and a rehearing in banc (R. 49a). By orders dated May 8, 1963 the Court denied the petitions for rehearing (R. 61a and 65a).

The jurisdiction of the Courts below was based on 28 U. S. C. Secs. 1332(a), (c), (d); 1391(a), (c), Acts of June 25, 1948, C. 646, 62 Stat. 930, 937 (Appendix B, p. B1). Additional Statutes and rules involved are 28 U. S. C. 1404(a), Act of June 25, 1948, C. 646, 62 Stat. 937, and Rules 4(d)(3)(7) and 12(b)(1) to (5) inclusive of the Fed. Rules Civ. Proc. 28 U. S. C. A. (Appendix B, p. B2). Also in-

volved are the following provisions of the United States Constitution: Article III, Sections 1 and 2, U. S. C. A. Const. Art. III Secs. 1 and 2; The Fifth Amendment, 1 Stat. 97, U. S. C. A. Const. Amend. IV; The Seventh Amendment, 1 Stat. 97, U. S. C. A. Const. Amend. VII; and the Fourteenth Amendment, Sec. I, 14 Stat. 358, Const. Amend. XIV Sec. I (Appendix B, pp. B3-B5).

The jurisdiction of this Court to review by writ of certiorari the judgment complained of, is conferred by 28 U. S. C. Secs. 1254(1) and 2101(c), Act of June 25, 1948, C. 646, 62 Stat. 928, 961 (Appendix B, p. B6).

Questions Presented

In diversity actions in the United States District Courts for the Southern and Eastern Districts of New York where service was made pursuant to Fed. Rules Civ. Proc. 4(d)(3), 28 U. S. C. A., brought by United States citizens and longshoremen, residents of Baltimore, for a maritime tort aboard a United States vessel in Baltimore harbor, arising out of cargo shipped from Puerto Rico, against the shipper, a Puerto Rican corporation (subsidiary of a New York corporation, with its place of business in the Eastern District), having substantial contacts in the Eastern District and a president resident and acting for it there and claiming no hardship in defending in either forum, the following questions are presented to this Honorable Court:

(1) Is the jurisdictional power of the District Courts over a foreign corporation in a diversity maritime case based on federal law and fixed by a federal standard, or does state law and a state standard prevail?

(2) Did the Court of Appeals err, (a) in interpreting and applying the jurisdictional test pronounced by this Court in *International Shoe Co.* v. *Washington* (1945), 326 U. S. 310, "not as a federal jurisdictional standard but as a Constitutional limitation upon the exertion of state judicial power", (b) in failing to make "an estimate of the inconveniences" of the parties, (c) in finding the causes did not arise out of activities in the forum state, and (d) in holding the test was not satisfied?

(3) Were petitioners deprived of due process of law under the Fifth Amendment and a fair jury trial under the Seventh Amendment in being forced to try their actions in the distant predominantly Spanish speaking possession of Puerto Rico, when all their witnesses, evidence and sources of proof were at Baltimore (the locus of the accident), approximately 188 miles from the New York forum and respondents did not claim that a trial there would be a hardship?

STATEMENT OF THE CASE

Proceedings Below

These diversity suits brought by Baltimore longshoremen, citizens of the United States and Maryland, for personal injuries sustained aboard the S.S. Frances in Baltimore harbor on March 28, 1961, when chlorine gas emanated from cylinders owned and shipped as empty chlorine cylinders by respondent Peerless Chemicals (P. R.) Inc. (Pltfs' Ex. 25 id.; E. R. 77-88; E. R. 133 annexed), hereinafter referred to as Peerless (P. R.) or subsidiary, were first filed

in the District Court for the Southern District of New York (S. R. 1-17).

Peerless Oil & Chemical Corp., a New York corporation, hereinafter referred to as Peerless or parent, answered the complaint interposing a general denial (S. R. 31-36). Peerless (P. R.) moved under Rule 12(b)(1) to (5) inclusive of Fed. Rules of Civ. Proc., to vacate service, claiming it did not do business within the jurisdiction (S. R. 20-25; 47-75). District Judge Lloyd F. MacMahon dismissed the action stating that if Peerless (P. R.) "• • • is doing business anywhere within the state, such business is being conducted at the parent corporation's offices in Long Island City located in the Eastern District of New York, • • •" (Appendix A, p. A5). The action should have been transferred to the Eastern District under 28 U. S. C. A. 1404(a). Petitioners appealed from the judgment dismissing the complaint (S. R. 117).

Petitioners then brought similar actions against the respondents in the District Court, Eastern District of New York (E. R. 134-150). Again service was made pursuant to Rule 4(d)(3) of the Fed. Rules of Civ. Proc. on Peerless (P. R.) by serving its president Dennis J. Carey, Jr., hereinafter referred to as Carey, at the offices of the respondent Peerless in the Eastern District (S. R. 45-46; E. R. 152). Peerless (P. R.) moved to dismiss on the same ground previously urged in the Southern District and on the further ground that jurisdiction had been adjudicated in the Southern District action (E. R. 167-201). Again Peerless answered by general denial (E. R. 153-166). Judge Joseph C. Zavatt held that jurisdiction was not *res adjudicata* and permitted petitioners to take the deposition of the respond-

ents (E. R. 295-296); Carey testified for both respondents (E. R. 3). District Judge John F. Dooling, Jr., by written opinion, Appendix A (p. A7), held that the contacts of Peerless (P. R.) were not sufficient to sustain jurisdiction. An order vacating service and denying jurisdiction was entered (E. R. 337-338). Notice of appeal was filed (E. R. 341). An order was entered in the Court of Appeals consolidating the appeals (R. 30a). That Court affirmed the orders of Judge MacMahon and Judge Dooling, vacated service and dismissed the complaint as to Peerless (P. R.) for lack of jurisdiction over it (R. 45a and 47a).

Contacts of Peerless (P. R.) Inc. in the Eastern District of New York

By the Activity of Peerless Acting for Peerless (P. R.)

Peerless purchases and distributes chemicals and maintains its offices and warehouses in the Eastern District of New York (E. R. 6-7). Its president, Carey, conceived the idea of organizing Peerless (P. R.) as a subsidiary Puerto Rican corporation to engage in similar business in Puerto Rico. Peerless supplied all the capital of $5,000.00 and received 4,995 shares of stock of Peerless (P. R.); each of the five directors received one of the remaining five shares (E. R. 9-10; 18-22; 27-28). Carey and Hugh L. Carey, both residents of the Eastern District, became respectively president, vice-president and directors (E. R. 4-5).

Peerless (P. R.) purchases ten percent of its gross tonnage and thirty percent of its dollar volume from Peerless (E. R. 38-39). Ninety percent of these purchases are delivered from the stock of the parent at its warehouse in the

Eastern District. The remaining ten percent is purchased by the parent and resold to its subsidiary as the latter cannot obtain credit (E. R. 44-45; 62-65). These purchases increased from approximately $55,000.00 in 1959 to $130,000.00 in 1961 (E. R. 51-58) and are made at the offices of the parent in the Eastern District; there by mail, telephone and Telex the orders are received and shipments made; the chemicals are taken from the warehouse, steamship space is booked, the shipment is sent to the pier, shipping documents such as Plffs' Ex. 28 id. (E. R. 133 annexed) go to the order department which issues an invoice to the subsidiary such as Plffs' Exs. 27, 28 id. (E. R. 133 annexed; 59-60; 98-103). If the parent does not have the chemicals, it purchases them and when they are sent to its warehouse the same procedure is followed; when they are shipped directly to the subsidiary the parent makes payment and bills its subsidiary by invoice such as Plffs' Exs. 23, 24, 26 id. (E. R. 133 annexed; 62-69; 100-103). In making these purchases the subsidiary obtains substantial credit from its parent. Plffs' Exs. 21, 22 id. (E. R. 133 annexed), accounts receivable ledger of Peerless, shows that the subsidiary does not pay on an item basis, but occasionally remits substantial checks, and while it has had a credit balance, it generally has a substantial debit balance which amounted to $56,924.55 on January 12, 1962 (E. R. 54-55).

By Carey Acting as President and General Manager of Peerless (P. R.)

From the offices of the parent Carey not only functions as president of Peerless (P. R.), he manages its daily operations. He testified that he decides corporate policy, the products to be sold, the possibilities of new business, advises on day to day operations and on his trips to Puerto Rico,

meets with the corporation's personnel (E. R. 36-38). He studies the chemical market as to price, competition and profit at the parent's offices and in Puerto Rico (E. R. 45-46). His management is accomplished by telephone, mail and Telex and his dealings with chemical suppliers here (E. R. 39-43; 70-74). Plffs' Exs. 1 to 20 id. (E. R. 133 annexed), are samples of Telex communications; Plffs' Exs. 2, 7, 10 id. (E. R. 133 annexed) picked at random and interpreted by Carey, are conversations between him and the subsidiary (E. R. 103-110); in 2 it advises him that its bid was not the lowest and it is mailing details; he sends instructions (E. R. 103-106): in 7 it advises him that a tanker carrying caustic soda was delayed; he inquires if the delay poses a problem and is informed that it does not; they converse on the dredging of a channel in Puerto Rico which involves the draft of a ship arriving and he states that he will be in Puerto Rico in a few days (E. R. 106-107); in 10 he asks about a Wyandotte chemical matter and a loan from a local bank to finance chemical purchases; he advises that the tanker Bushey has loaded, is on route and he will give a progress report tomorrow (E. R. 108-109). Plffs' Exs. 29, 30, 31 id. (E. R. 133 annexed) are samples of 250 letters produced as correspondence between the subsidiary and Carey and disclose that it advises him in detail as to its operations and requests information and instructions which he sends. Where more urgent contact is required the telephone is used (E. R. 39-42; 118-120).

The chemicals which the subsidiary does not purchase from its parent are obtained from other suppliers, all of whom ship directly to the subsidiary (E. R. 69-72), but it would not take on a new chemical without the approval of Carey (E. R. 127-128). These suppliers call Carey at the

offices of Peerless, soliciting additional business from the subsidiary, advising him and giving him information about the market and competitors in Puerto Rico and arranging for the calls of their representatives there (E. R. 70-76). In the chemical trade Carey is better known as a representative of the subsidiary than as a representative of the parent (E. R. 129). Hence the latter's telephone listing, like its offices, is also that of the subsidiary.

All the subsidiary's insurance save liability was procured by Carey through brokers in New York City (E. R. 89-91); liability was obtained by endorsing a policy held by Peerless and the premiums were paid by it (E. R. 89-94). Carey occasionally signs the checks of the subsidiary at the parent's offices (E. R. 127).

The Causes of Action Are Substantially Related to the Activities of Peerless (P. R.) in the Eastern District

Peerless sold the empty chlorine cylinders to its subsidiary, thereafter paid all repair charges and billed its subsidiary (Plffs' Ex. 23 id.; E. R. 121-126; 133 annexed). The empty cylinders were filled with chlorine by Westvaco and sent to Bull Lines for shipment to the subsidiary in Puerto Rico; Peerless paid for the chlorine and freight charges and billed its subsidiary (Plffs' Ex. 26 id.; E. R. 133 annexed), and was designated as shipper on the Bill of Lading (Plffs' Ex. 25 id.; E. R. 133 annexed); when the chlorine gas was sold the subsidiary shipped the cylinders for refilling to Westvaco and designated Peerless on the arrival notice on the Bill of Lading; Westvaco called Peerless when the cylinders arrived (E. R. 77-88). In this manner the subsidiary systematically and continuously purchased chlorine from its parent on credit (E. R. 54-55). Carey, president of both parent and subsidiary and manager of

the daily operations of the latter and acting in the forum, made these purchases and sales and supervised the sale of the gas and the shipment of the cylinders from Puerto Rico (E. R. 36-51; 103-110; 127-129; Plffs' Exs. 1-20; 29-30; E. R. 133 annexed).

The New York Forum the Only One Available Save Puerto Rico Imposed No Hardship

Peerless (P. R.) did not claim that a trial in the forum would be no inconvenient as to constitute a hardship (S. R. 53-57; 79-82; E. R. 189-196; 210-215), and is engaged in business only in Puerto Rico and New York (E. R. 1-133).

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court and With a Decision of the Tenth Circuit

This Court has never decided the fundamental question presently in sharp debate and conflict, whether state or federal law determines the jurisdictional presence of a foreign corporation served with process under federal law, in a diversity action. The Court of Appeals below in *Jaftex Corporation* v. *Randolph Mills, Inc.* (1960), 282 F. 2d 508 concluded (516), "whether a foreign corporation is present in a district to permit service of process on it is one of federal law governing the procedure of the United States Courts". Although the problem was again before that Court, then in banc, in *Arrowsmith* v. *United Press International*, decided June 11, 1963, the Court reached a decision here before deciding *Arrowsmith*, saying (696): "The outcome of that case is of no moment here, because both parties have agreed, that this Court should apply the

International Shoe test—fashioned there not as a federal jurisdictional standard, but as a Constitutional limitation upon the exertion of state judicial power—which is thought to be more permissive than the prevailing New York jurisdictional test,". In restricting jurisdiction to the limits of state power, the Court necessarily applied a state standard and forecast its decision in *Arrowsmith*. In petition for rehearing denied without opinion, petitioners argued, that while they had urged having met the standards of "presence" and "estimate of inconveniences" principles of *International Shoe* v. *Washington* (*supra*), a case involving the Constitutional validity of a state judgment, that the Court of Appeals had limited the former standards and failed to consider the latter; that they had relied on *Jaftex* which had established a federal jurisdictional standard, unfettered by state power, and as petitioners' substantive and procedural rights were "rooted in federal maritime law", *Pope & Talbot* v. *Hawn* (1953), 346 U. S. 406, 409, those rights were not subject to Constitutional limitations on state power; and the Court's decision was also contrary to *Barrow Steamship Co.* v. *Kane* (1898), 170 U. S. 100, where this Court sustained jurisdiction in a maritime diversity cause in the absence of state jurisdictional law. The Court's holding in *Jaftex* was reversed when the Court in deciding *Arrowsmith* applied state law, over the dissent of Judge Clark. The majority asserted that the only contrary authority was *Jaftex*, but two days later in *Houston Fearless Corp.* v. *Teter* (decided June 13, 1963), the Court of Appeals for the Tenth Circuit applied federal law to the same problem, although the same day in *Walker* v. *General Features Corp.*, the Court applied state law where service was made under a state substituted service statute made operative by F. R. Civ. Proc. 4(d)(7). Thus the dissent

of Judge Clark in *Arrowsmith* was brought into focus, for in appendix he demonstrates that save for *Partin* v. *Michaels Art Bronze Co.* (3 CCA 1953), 202 F. 2d 541 and *Canvas Fabricators, Inc.* v. *William E. Hooper & Sons Co.* (3 CCA 1952), 199 F. 2d 484, the authorities relied on by the majority all involved service of process under state law.

The Importance of the Questions Presented

The fundamental question, "is one going to the very heart of our national system of courts", Judge Clark said dissenting in *Arrowsmith* (2350 of the Court's opinion). Consideration of the fundamental question can hardly be avoided in determining the applicable law in a maritime cause, particularly as the Court of Appeals below applied *International Shoe* to limit state judicial power over corporate presence to situations where, "the state has an interest in subjecting to its judicial process" a foreign corporation whose state activities "are given protection by state law" or "expose its residents to risk of physical harm or economic loss" (697). In making maritime diversity jurisdiction dependent on state interest and power and in placing unwarranted limitations on that interest and power, the Court impaired the maritime rights of more than one million maritime workers in the United States.

Answering the First Question Presented

In the Ordinary Diversity Case

Answering first the fundamental question of what law governs corporate jurisdictional presence in the ordinary diversity case based on service under federal law, we rely

on the opinions of Judge Clark written for the majority in *Jaftex* and for the dissent in *Arrowsmith*, and merely summarize his thesis.

Erie R. Co. v. *Tompkins* (1938), 304 U. S. 64 decided only that appropriate state substantive law must be applied in diversity cases and left undisturbed the jurisdiction, practice and procedure of the federal courts. The judicial power of the federal courts to entertain diversity cases arises from Art. III, Secs. 1 and 2 of the Constitution. The jurisdictional presence of a foreign corporation involves statutory authority to make effective service of process on the corporation and the law of corporate presence. 28 U. S. C. Sec. 1391(c) (Appendix B1) which provides that "a corporation may be served in any judicial district in which it • • • is doing business" is a venue statute, but 28 U. S. C. Sec. 1693 (Appendix B6) is a service statute with ancient roots, requiring service within the district and designed to protect a litigant from a trial away from his home. F. R. Civ. Proc. 4(d)(3) which has the force of law, provides for the manner of serving a foreign corporation. Thus the power to make service as well as the manner of making it, is prescribed by federal statutory law. In harmony with these statutory procedural provisions federal courts developed their own principles of what constitutes corporate presence within the district, completely independent of the state law, *Philadelphia & Reading Ry. Co.* v. *McKibben* (1917), 243 U. S. 264, so that the law of corporate jurisdictional presence as a whole is procedural and governed by federal law. And this conclusion is supported by *Mississippi Pub. Corp.* v. *Murphree* (1946), 326 U. S. 438 and *Simler* v. *Connor* (1963), 372 U. S. 221.

In a Maritime Diversity Case

However the conflict may be resolved in the ordinary diversity case, federal law is the only answer to the question in a maritime cause, for both the procedural and substantive characteristics of such a cause are under national and not state control, *Panama R. Co.* v. *Johnson* (1924), 264 U. S. 375. In *Barrow S.S. Co.* v. *Kane* (*supra*), a diversity action by a nonresident against a foreign corporation for a maritime tort suffered abroad while a steamship passenger, this Court concluded that federal power to sustain jurisdiction was not lost in the absence of state power, stating (112) "The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other states, cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and Laws of the United States." Judge Friendly for the majority in *Arrowsmith* and the dissent in *Jaftex*, in the latter (517), conceded that in "fields such as admiralty, see *Levinson* v. *Deupree*, 1953, 345 U. S. 648," federal law answered the problem. In *Pope & Talbot, Inc.* v. *Hawn* (*supra*), this Court rejected the argument that the Erie doctrine required the application of the Pennsylvania contributory negligence rule in a longshoreman's diversity suit based on a maritime tort in Pennsylvania waters; it reaffirmed *Garrett* v. *Moore-McCormack* (1942), 317 U. S. 239, where it held that the Pennsylvania procedural rule of burden of proof was not applicable in a suit for a maritime tort prosecuted in the state court, and that state practice could not alter rights rooted in federal law; and speaking of the type of action the petitioners have brought here, the Court said (409), it was one "which the Constitution has placed under the national power to control in 'its substan-

tive as well as its procedural features * * *" *Panama R. Co.* v. *Johnson*, 264 U. S. 375". The jurisdictional power of the District Courts over foreign corporations in diversity maritime causes is based on federal law and a federal standard of corporate presence must prevail.

Answering the Second Question

Errors in Interpreting International Shoe

(a) *International Shoe Co.* v. *Washington* (*supra*), and its progency in this Court—*Perkins* v. *Benguet Consol. Min. Co.* (1952), 342 U. S. 437; *McGee* v. *International Life Ins. Co.* (1957), 355 U. S. 220 and *Hanson* v. *Denckla* (1958), 357 U. S. 235—involved the Constitutional validity under Due Process of state court judgments procured by service of state process on foreign corporations.

In *International Shoe*, which involved the sale of shoes shipped from outside the forum state, corporate presence was reduced to (316) "certain minimum contacts" in the forum state which "make it reasonable in the context of our federal system of Government, to require the corporation to defend the particular suit." In *Perkins* the right of Ohio to take in personam jurisdiction over an (317) "amply notified Philippine corporation to enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State", was sustained. In *McGee* the judgment of a California court against an insurer which sold a policy by mail, was sustained as (223) "California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." In *Hanson* the Florida contacts of a trustee were insufficient to sustain a Florida judgment and this Court said (250) that "the trend of expanding

personal jurisdiction over non-residents" noted in *McGee*, did not establish "the eventual demise of all restrictions on the personal jurisdiction of state courts", which "are a consequence of territorial limitations on the power of the respective States." In this Constitutional setting, this Court has never limited foreign corporate jurisdictional presence to situations where "the state has an interest in subjecting to its judicial process" activities which "are given protection by state law" or subject state residents "to risk of physical harm or economic loss." The Court of Appeals erred in interpreting *International Shoe* and its successors and pronounced a new and restrictive test of jurisdictional presence.

Errors in Applying International Shoe

It is apparent from the Court's test that if the state should either fail to bring the prescribed activities within the reach of its judicial processes, or deny non-residents the right to invoke them, jurisdiction is lost. Thus jurisdiction is made to depend upon the state whim as well as upon the limits of its power. And for the reasons previously mentioned (*supra*, pp. 14, 15) the Court of Appeals erred in applying the test to a maritime cause.

An "Estimate of the Inconveniences" of the Parties Was Not Made

(b) In *International Shoe* this Court said (317), "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant" in determining presence. The accident occurred in Baltimore, there it was investigated by the United States Coast Guard and the cylinders were inspected and tested by experts, there the petitioners

were hospitalized and treated. The witnesses, evidence and sources of proof are all at the Baltimore area approximately 188 miles and three to four hours traveling time from the New York forum. The Puerto Rican corporation made no claim that a trial in the forum would subject it to hardship. Its insurer also is in the forum. The Court of Appeals made no "estimate of the inconveniences" of the parties and demonstrated no inconvenience to the Puerto Rican corporation, but said (699), it was "so much an effectively independent corporate entity—certainly not in a position conveniently to defend an action here—that to subject it to judicial process in the State of New York under the circumstances of this case would be to impose an unconstitutional burden." The burden imposed on the petitioners in compelling them to try their causes in Puerto Rico, a relevant factor in determining presence, *Travelers Health Asso.* v. *Virginia* (1950), 339 U. S. 643, 648, was not considered by the Court.

The Causes Arose Out of the Activities of Peerless (P. R.) in the Forum

(c) Petitioners' causes bore substantial relation to the activities of the subsidiary in the forum (*supra*, pp. 9, 10) and satisfied *International Shoe* (1326). The Court of Appeals found (700), "New York's contacts with the cause of action are far too tenuous to merit subjecting the foreign corporation to suit there." But the Court had misgivings about its determination for in footnote 5 it said, "the sheer implausibility in the case before us in applying New York tort law to the Maryland accident fortifies us in denying jurisdiction in a federal court sitting in New York." The Court was fortified by a choice it did not have for federal law and not state law applied to the tort, *Pope & Talbot* v. *Hawn* (*supra*).

The Activities of Peerless (P. R.) Satisfied the Test of the Court of Appeals

(d) Nevertheless the activities of the Puerto Rican corporation satisfied the restrictive test of the Court of Appeals; when its president Carey (*supra*, pp. 8, 9) and its parent corporation (*supra*, pp. 6, 7) purchased chemicals for it in the forum state, such contracts gave the Puerto Rican corporation the protection of New York law and subjected state residents to potential economic loss. When the parent, acting as agent, shipped the chemicals from the forum state (*supra*, p. 7), the subsidiary again subjected state residents to potential "physical harm or economic loss". Although the parent was an exclusive purchasing agent for its subsidiary and the purchases were systematic, continuous and constantly increased (*supra*, p. 7), the Court of Appeals distinguished this activity from that in *International Shoe*, because there, an "employee group" solicited the sales. The Court (699) said that the activities of Carey in behalf of the subsidiary (*supra*, pp. 7-9) were insufficient because a "far greater proportion related to intra-corporate affairs, rather than to business dealings with residents of New York," and therefore "the less likely it is that the corporation has reaped benefits and protection from the laws of that State". This places presence on a speculative and quantitative basis frowned on by this Court in *International Shoe* (319) which determined that activity was not to be tested on a "mechanical or quantitative basis" or whether it "is a little more or a little less."

Answering the Third Question

Petitioners Were Deprived of a Fair Jury Trial and Due Process

As petitioners have demonstrated, the New York forum is convenient for both parties and the Puerto Rican forum

is not (*supra*, p. 16). A Puerto Rican trial would preclude petitioners (longshoremen) from producing witnesses in a Puerto Rican court because of the travel expense between Baltimore and Puerto Rico and the value of time lost, and compel them to resort to deposition testimony, and expensive procedure and an unsatisfactory foundation for the trial of a jury case; it also would subject them to substantial expense in attending and impose dual counsel fees, in requiring the employment of Puerto Rican trial counsel; and it would subject them to a trial outside the United States in strange surroundings in a predominantly Spanish speaking possession. These burdens reduce the monetary value of any recovery the petitioners might ultimately secure and in depriving them of an opportunity to properly and fully present their cause to a jury, reduce their chances of obtaining an adequate award and deprive them of a fair jury trial guaranteed by the Seventh Amendment. Petitioners as longshoremen, had the status of seamen, *International Stevedoring Co.* v. *Haverty* (1926), 272 U. S. 50, and came within the range of the "humanitarian policy" designed to protect their rights, *Reed* v. *Steamship Yaka* (May 27, 1963), 373 U. S. —, 10 L. ed. 2d 448, 451; among these was the right to fully and completely present their evidence for jury determination, *Ferguson* v. *Moore-McCormack Lines* (1957), 352 U. S. 521, 523. On a jury trial based on federal standards, *Simler* v. *Conner* (*supra*).

Although the very shipment which caused injury was protected by United States maritime law, the Court of Appeals on the ground of inconvenience never established, immunized the Puerto Rican corporation from suit in the forum under the due process clause of the Fourteenth Amendment; and in compelling petitioners to resort to a Puerto Rican tribunal on the record in this case, it deprived them of due process under the Fifth Amendment.

Conclusion

Corporate jurisdictional presence in a maritime diversity cause, whether a matter of substance or procedure, is under national control and governed by federal and not state law. In making corporate presence dependent upon the "constitutional limitations on the exertion of state judicial power", the Court of Appeals limited maritime jurisdiction to the whim and power of state legislative bodies in derogation of national control and uniformity of the maritime law and impaired the rights of more than one million maritime workers.

To compel Baltimore longshoremen to resort to a Puerto Rican Court, to enforce a cause based on a Baltimore accident with all of their witnesses, evidence and sources of proof located there, is to deprive them of due process under the Fifth Amendment and a fair jury trial under the Seventh Amendment and to establish a principle of great detriment to maritime workers.

Certiorari should be granted as prayed for.

Respectfully submitted,

GEORGE J. ENGELMAN,
Counsel for Petitioners,
44 Whitehall Street,
New York 4, N. Y.

JAMES T. SMITH,
of Counsel.

APPENDIX A

(R 45a)

(Copies of Opinions and Judgments Below)

Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
Circuit Judges,
HON. FREDERICK VAN PELT BRYAN,
District Judge.

AUGUSTUS BLOUNT, JOHN COLBERT, SEYMOUR COOMBS, ALBERT DAVIS, CALVIN E. HERBERT, THOMAS L. HILLIARD, JOHN HOLMAN, JAMES ARTHUR RIDDICK, WARNER TOPPIN, and ROBERT WALDEN,

Plaintiffs-Appellants,

v.

PEERLESS CHEMICALS (P. R.) INC., and
PEERLESS OIL & CHEMICAL CORP.,

Defendants-Appellees.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed; with costs to the appellee.

A. Daniel Fusaro
Clerk

(R 47a)

Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
Circuit Judges,
HON. FREDERICK VAN PELT BRYAN,
District Judge.

AUGUSTUS BLOUNT, JOHN COLBERT, SEYMOUR COOMBS, ALBERT DAVIS, CALVIN E. HERBERT, THOMAS L. HILLIARD, JOHN HOLMAN, JAMES ARTHUR RIDDICK, WARNER TOPPIN, and ROBERT WALDEN,

Plaintiffs-Appellants,

v.

PEERLESS CHEMICALS (P. R.) INC., and
PEERLESS OIL & CHEMICAL CORP.,

Defendants-Appellees.

Judgment

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

(SR 114-115)

Memorandum Opinion and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 1949

AUGUSTUS BLOUNT, JOHN COLBERT, SEYMOUR COOMBS, ALBERT DAVIS, CALVIN E. HERBERT, THOMAS L. HILLIARD, JOHN HOLMAN, JAMES ARTHUR RIDDICK, WARNER TOPPIN, and ROBERT WALDEN,

Plaintiffs,

against

PEERLESS CHEMICALS (P. R.) INC., and PEERLESS OIL & CHEMICAL CORP.,

Defendants.

MACMAHON, *D. J.*

The papers before this court fail to establish specific facts warranting the conclusion that Peerless Chemicals (P. R.) Inc. is engaged in a continuous and systematic course of business within the State of New York, Fed. R. Civ. P. 4(d)(3)(7). See Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., 299 N. Y. 208 (1949). Such inferences to the contrary as might be permissible indicate that if the Puerto Rican subsidiary is doing business anywhere within the State, such business is being conducted at the

parent corporation's offices in Long Island City, located in the Eastern District of New York.

Accordingly, the motion of the defendant Peerless Chemicals (P. R.) Inc. to vacate service of the summons and complaint and to dismiss the action for improper venue is granted, Fed. R. Civ. P. 12(b)(2)(3); 28 U. S. C. A. §1406(a).

So ordered.

Dated: New York, N. Y.
September 19, 1961

LLOYD F. MACMAHON,
U. S. D. J.

(E. R. 326-336)

Opinion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

61 Civ. 754

AUGUSTUS BLOUNT, JOHN COLBERT, SEYMOUR COOMBS, ALBERT DAVIS, CALVIN E. HERBERT, THOMAS L. HILLIARD, JOHN HOLMAN, JAMES ARTHUR RIDDICK, WARNER TOPPIN and ROBERT WALDEN,

Plaintiffs,

against

PEERLESS CHEMICALS (P. R.) INC., and PEERLESS OIL & CHEMICAL CORP.,

Defendants.

DOOLING, JR.

Plaintiffs are longshoremen, who live in Maryland; they allege that while they were working on the S.S. Frances in Baltimore harbor on March 28, 1961 they were injured by noxious fumes that emanated without warning from fifteen cylinders that "the defendants" had sent from Puerto Rico to Baltimore aboard the S.S. Frances under bills of lading that described the cylinders as "Empty Chlorine Cylinders"; the claim is that the defendants were negligent because the cylinders were represented to be empty and were not and because the cylinders were not

tight but unseaworthy; Peerless Oil & Chemical Corp. promptly answered on the merits. Peerless Chemicals (P. R.) Inc. as promptly moved to vacate the service of summons on the ground that it does not conduct business in this jurisdiction and that the very point is *res judicata* by reason of the decision of Judge Lloyd F. MacMahon, rendered in a case brought in the Southern District Court by the same plaintiffs against the same defendants for the same cause, which granted this Puerto Rican company's motion . . . to vacate service of the summons and complaint and to dismiss the action for improper venue".*

In passing on the motion of Peerless (P. R.) made in the earlier action Judge MacMahon said that any possibly permissible inferences contrary to a conclusion that the Company was not engaged in a continuous and systematic course of business within New York State would indicate that, if Peerless (P. R.) is doing business anywhere in New York State, it is doing it in the Eastern and not the Southern District of New York.

The present action in this District followed. On Peerless (P. R.)'s motion to vacate service Judge Joseph C. Zavatt has heretofore rejected the *res judicata* argument; he directed that decision of the motion to vacate be held in abeyance pending plaintiffs' taking Peerless (P. R.)'s deposition on the doing business issue. That has now been done and the motion has been resubmitted for decision on

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* The Clerk's judgment entered on Judge MacMahon's decision was that Peerless Chemicals (P. R.) Inc. "have judgment against the plaintiffs and the service of summons and complaint is vacated and the complaint is dismissed."

the original papers, on the deposition and exhibits, and argument.

Peerless Oil & Chemical Corp. has been engaged in the purchasing, warehousing, marketing and delivering of industrial chemicals and petroleum products. Its warehouse and headquarters are in Long Island City; it has three stockholders, who are brothers; Dennis Carey, its president and treasurer, and a director; John R. Carey its vice-president, and a director, and Edward M. Carey, its third director, who is not active in the company and rarely visits its office; (he is actively associated with another and unrelated business enterprise).

Before 1959, commencing in 1952 or 1953, Peerless had sold industrial chemicals to Puerto Rican buyers through usual export channels and to one principal account in Puerto Rico. Dennis Carey made a survey of the possible chemicals market in Puerto Rico and concluded that a profitable venture there was possible (without benefit of the Puerto Rican tax exemption) in a line of industrial chemicals that would embrace some chemicals not dealt in by Peerless New York as well as chemicals in which it did deal.

Principally on the initiative of Dennis Carey, Peerless (P. R.) was incorporated under the laws of Puerto Rico in February 1959 to enter the chemical trade in Puerto Rico. Its capital was $5,000 and Peerless New York paid in that entire amount; Peerless New York received, ultimately, 4,996 shares of stock; four shares were held in the names of the directors, Dennis Carey, who also became

president of Peerless (P. R.), Jose Vivas, counsel to Peerless (P. R.) in Puerto Rico and also its secretary and treasurer, John J. Orr, vice-president, and Denby Varley. Hugh L. Carey, originally a director, ceased to be such in January 1961 when he assumed the duties of his public office. Peerless New York and Peerless (P. R.) had only one director in common and one officer, Dennis Carey, for he became president of Peerless (P. R.).

Peerless (P. R.) started business early in 1959. It acquired land in Puerto Rico and commenced to build (and completed later in 1959) a chemical warehouse and also a storage tank for liquid caustic soda. The land purchase and construction were financed by a $60,000 loan contracted in Puerto Rico and guaranteed by Dennis Carey individually. The stock certificates issued by Peerless (P. R.) are kept in Puerto Rico by Vivas. Peerless New York has made no loans or advances* to Peerless (P. R.) and has not guaranteed any of its contracts or obligations. The directors' meetings of Peerless (P. R.) are held in Puerto Rico and occur several times a year; none has been held in New York. Dennis Carey receives no compensation as president of the Puerto Rican corporation but is reimbursed by it for the expenses incurred on his trips to Puerto Rico on its business; the company operates at a profit but has not yet paid a dividend; it has made payments on account of its Puerto Rican loan. Dennis Carey goes to Puerto Rico on Peerless (P. R.) business once every month or two months and stays from three days to a week on such trips.

* Inter-company indebtedness on sales from parent to subsidiary has existed in substantial amount.

Opinion

Peerless (P. R.) deals in chemicals of the kind dealt in by Peerless New York but also deals in liquid caustic soda, certain phosphate products, chlorine and certain chlorinated products; Peerless New York does not deal in these latter products: Peerless (P. R.) buys its chemicals from Wyandotte Chemicals International (its principal supplier), from Jones Chemical Co., of Buffalo, from the Westvaco Mineral Products and the FMC International divisions of Food Machinery and Chemical Corporation (FMC Corporation) and from Peerless New York. Ten percent in volume and thirty percent in value of Peerless (P. R.)'s chemicals are bought from Peerless New York on the same terms on which Peerless New York sells to the rest of the trade. The purchases from Peerless New York are of two classes; first, chemicals sold out of the warehouse stocks of Peerless New York; and, second, chemicals bought by Peerless New York and resold by it to Peerless (P. R.) but shipped by the ultimate supplier directly to Peerless (P. R.) on invoices rendered to Peerless New York. Sales of the second class by Peerless New York to Peerless (P. R.) represent about ten percent of Peerless New York sales to Peerless (P. R.). The Puerto Rican company buys from Peerless New York those chemicals in which both companies deal; its purchases through Peerless New York of ship-direct chemicals are, in part at least, occasioned by the fact that some suppliers will not ship out of the continental United States unless the "foreign" consignee pays in advance of shipment; this complication is avoided by having Peerless New York buy the chemicals and it then resells them to Peerless (P. R.).

Opinion

Peerless (P. R.) has bought chemicals from Peerless New York approximately as follows: In 1959, $55,000; in 1960, $80,000; and in 1961, $130,000. Peerless New York renders regular invoices upon shipment and Peerless (P. R.) pays in round amounts by checks drawn on its own Puerto Rican bank. Such payments have, not infrequently, resulted in a credit balance in favor of Peerless (P. R.) in the running account between the companies and such credit balances at times continued, particularly in the earliest part of the period, for considerable intervals.

Wyandotte, Jones Chemical and FMC International have sold and shipped their products directly to Peerless (P. R.) and billed it. Westvaco Mineral Products Division, however, has made its sale of chlorine to Peerless New York but has shipped to Peerless (P. R.) via rail to Bull Lines, Baltimore, and via Bull Lines from Baltimore to Puerto Rico; that Bull Lines bills of lading show Peerless New York as the shipper to Puerto Rico in such transactions. The chlorine is delivered by Westvaco in cylinders that Peerless New York bought from Westvaco in 1959 and resold in 1959 to Peerless (P. R.) After each lot of chlorine (usually 14 or 15 cylinders) is used up, Peerless (P. R.) ships the cylinders back to Westvaco via Bull Lines to Baltimore under a bill of lading by the terms of which arrival notice is to be given only to Peerless New York. Apparently this has not in practice been done; Bull Lines seems to load the returned empty cylinders directly to Westvaco flatcars on arrival in Baltimore without further instruction and Westvaco advises Peerless New York when it has received the cylinders at its plant for refilling.

Opinion

Dennis Carey, as president of Peerless (P. R.), decides questions about its corporate policies, such as its choice of products and marketing policies; he offers advice to those in charge of the Puerto Rican company's day-to-day operations and he periodically visits Puerto Rico on the company's business. He keeps informed on market conditions and price trends on behalf of the Puerto Rican company as well as on behalf of Peerless New York. It is a fair inference that by teletype, letter and telephone Dennis Carey preserves a continuing liaison with Peerless (P. R.), is available to it for advice and guidance that are sought and extended, and from time to time performs in New York characteristically executive acts related to the affairs of Peerless (P. R.). He has the authority to sign checks on the Peerless (P. R.) Puerto Rican bank account and he has signed such checks in New York, though how often and how importantly is not shown.

Peerless (P. R.) is in no sense a department or agency of Peerless New York. Its business is distinct in composition and location and it has its own operating personnel. No doubt its substantial purchases from Peerless New York and the credit advanced to it of buying such products as the Westvaco chlorine through Peerless New York (possibly at a profit to Peerless New York) reflect practices that might not have existed were the companies not parent and subsidiary; but they are that and such favoritism in trade, if it be such, is neither agency nor impropriety. Equally, it does not appear that Peerless New York was the agent or implement of Peerless (P. R.). The parties were free to choose their forms of doing business with each

other and there is no indication that they violated the integrity of the forms they chose or rendered them unreal by any course of conduct shown in the evidence.

The case comes down ultimately to the effect to be given to Dennis Carey's activities in New York. Apart from those, Peerless (P. R.) was simply not here; it was not qualified to do business here, had no payroll employees here, paid no taxes and held no property here and did not in anyway create any appearance of being here, as by a listing in the telephone book or on any door.

Certainly the Company's president never for a moment ceased to be that. What Dennis Carey did in the interest of Peerless (P. R.) while in New York was certainly business activity in its inclusive meaning but the sense of the record is that it was the interpolation here of concerns that belonged to a genuinely Puerto Rican set of business activities. The sense of the record is that his activities were essentially Puerto Rican, though carried on from here when he was here; they were not, it would appear, activities that required, or greatly profited by, his being here; New York was not the locus of his presidency of Peerless (P. R.).

It is concluded on the facts, that jurisdiction over Peerless Chemicals (P. R.) Inc. has not been obtained. Cf McInness v. Fontainebleau Hotel Corp., 2nd Cir., 1958, 257 F. 2d 832, 833; Horwitz v. Shainbag, E. D. N. Y. 1959, 171 F. Supp. 75, 76.

In view of the decision in Goldlawr, Inc. v. Heiman, (U. S. Sup. Ct. April 30, 1962), plaintiff may, within ten

days submit any suggestion it considers appropriate under that case and F. R. C. P. 54 (b) as amended and a proposed order giving effect to its suggestion and Peerless (P. R.) Inc. may within five days thereafter submit any responsive material and a proposed order giving effect to its suggestion.

JOHN F. DOOLING, JR.
U. S. D. J.

(R. 33a)

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 298 & 299—October Term, 1962

(Argued March 28, 1963 Decided April 15, 1963)

Docket Nos. 27263 & 27623

AUGUSTUS BLOUNT, JOHN COLBERT, SEYMOUR COOMBS, ALBERT DAVIS, CALVIN E. HERBERT, THOMAS L. HILLIARD, JOHN HOLMAN, JAMES ARTHUR RIDDICK, WARNER TOPPIN, and ROBERT WALDEN,

Plaintiffs-Appellants,

v.

PEERLESS CHEMICALS (P. R.) INC., and PEERLESS OIL & CHEMICAL CORP.,

Defendants-Appellees.

Before WATERMAN and KAUFMAN, Circuit Judges, and BRYAN, District Judge.

KAUFMAN, Circuit Judge.

This is a consolidated appeal from two orders, one in the District Court for the Southern District of New York, and the other in the District Court for the Eastern District

of New York, vacating service and dismissing the complaint against defendant appellee, Peerless Chemicals (P. R.) Inc., a Puerto Rican corporation. The action, first brought in the Southern District, is founded upon personal injuries suffered by plaintiffs, Baltimore longshoremen, aboard the S.S. Frances in Baltimore Harbor, and alleged to have resulted from the escape of chlorine gas from certain supposedly empty chlorine cylinders owned and shipped by Peerless Chemicals (P. R.) Inc., hereinafter referred to as Peerless (P. R.). Jurisdiction rests upon diversity of citizenship, 28 U. S. C. §1332. Judge MacMahon vacated service upon Dennis J. Carey, Jr., president of Peerless (P. R.), effected at the Long Island City offices of the parent corporation, Peerless Oil and Chemical Corp., hereinafter referred to as Peerless. He also dismissed the complaint against Peerless (P. R.), finding that it was doing no business within the state of New York and that any possible inferences to the contrary indicate at best that business is being conducted in the Eastern District, where the offices of the parent are located. Plaintiffs then filed their complaint in the Eastern District. Judge Dooling held, after considering a lengthy deposition of Peerless (P. R.) through its president Dennis Carey, that the corporation was doing no business in New York, and that the court was therefore without jurisdiction.

We are thus confronted with the question whether Peerless (P. R.) was "doing business" in New York, more specifically in Long Island City, such that a federal court sitting in New York may assert jurisdiction over it in the particular circumstances of the case before us.

Whether the standard of "doing business" for federal diversity cases is that of the state in which the federal court sits, or is a distinct federal standard, was resolved by this Court in an alternative holding in Jaftex Corp. v. Randolph Mills, 282 F. 2d 508 (2d Cir. 1960); there, over the dissenting voice of Judge Friendly, Judges Lumbard and Clark decided that a federal standard, apparently congruent with that set down in International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), should apply. This Court is presently reconsidering this problem *in banc*, in the case of Arrowsmith v. United Press International (appeal from 205 F. Supp. 56 (D. Vt. 1962)). The outcome of that case is of no moment here, because both parties have agreed that this Court should apply the International Shoe test—fashioned there not as a federal jurisdictional standard, but as a constitutional limitation upon the exertion of state judicial power—which is thought to be more permissive than the prevailing New York jurisdictional test, see Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1922). It is true that parties cannot, by consent, confer jurisdiction on the federal courts, but that too is of no moment, for we hold that the Puerto Rican corporation was not, even under International Shoe, doing sufficient "business" in New York, and we therefore affirm the dismissal of the complaints in both the Southern and Eastern District Courts.

I.

The Supreme Court's approach to the question of personal jurisdiction over a foreign corporation is revealed

not only in International Shoe but also in such more recent cases as Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952), and Hanson v. Denckla, 357 U. S. 235, 250-255, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). See generally Kurland, "The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts", 25 U. of Chi. L. Rev. 569 (1958); "Developments in the Law—State Court Jurisdiction", 73 Harv. L. Rev. 909, especially 919-35 (1960); Note, "Jurisdiction Over Foreign Corporations—An Analysis of Due Process", 104 U. of Pa. L. Rev. 381 (1955). One concludes from a study of the foregoing that the two fundamental factors determinative of the propriety of personal jurisdiction appear to be the nature and extent of the business activities conducted by and on behalf of the foreign corporation in the forum state, and the relationship to that state and those activities of the cause of action upon which suit is founded. Thus, a corporation which expends money, time, and effort extensively within a state, thereby exercising the privilege of dealing with its residents, may receive considerable economic benefit; when its activities are given protection by state law, it ill behooves the corporation to complain about appearing there to litigate. See Hanson v. Denckla, 357 U. S. at 253, 78 S. Ct. at 1239; International Shoe Co. v. Washington, 326 U. S. at 319, 66 S. Ct. at 159. Similarly, the state has an interest in subjecting to its judicial process a corporation whose activities in that state expose its residents to a risk of physical harm or economic loss; the state's interest in regulating such objectionable conduct within its borders is apparent even though

the plaintiff may be a nonresident; and the propriety of exercising jurisdiction is more obvious when the plaintiff is a resident. See McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); Perkins v. Benguet Consolidated Mining Co., supra; Travelers Health Ass'n v. Virginia, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1950).[1]

The court must apply these factors to the particular circumstances of the case before it, see MacInnes v. Fontainebleau Hotel Corp., 257 F. 2d 832, 833 (2d Cir. 1958), in order to determine whether it is "reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought" in the forum. International Shoe Co. v. Washington, 326 U. S. at 317, 66 S. Ct. at 158. Another factor—although in large measure a reformulation of the two basic ones just set out—is the so-called "balance of conveniences" of the parties in conducting the lawsuit in a given forum. Ibid. See Hutchinson v. Chase & Gilbert, 45 F. 2d 139, 141 (2d Cir. 1930) (L. Hand, J.). But we have been recently

[1] These considerations have been formulated in a somewhat different manner in the lucid concurring opinion of Judge Woodbury in W. H. Elliott & Sons Co. v. Nuodex Products Co., 243 F. 2d 116, 124 (1st Cir.), cert. denied, 355 U. S. 823, 78 S. Ct. 30, 2 L. Ed. 2d 38 (1957): "I think we should weigh on the one hand the legitimate interests of the state, 1) in providing local access to compensation for wrongs done to its citizens, and 2) in regulating potentially harmful activity within the state, as against, on the other hand, the legitimate interests of the foreign corporation relative, 1) to its reasonable expectations as to the laws and liabilities to which it was subjecting itself, and, 2) to its opportunity to defend itself without undue expense and inconvenience."

reminded by the Supreme Court that jurisdiction cannot be conferred solely because of the relative convenience of the parties; restrictions upon personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." Hanson v. Denckla, 357 U. S. at 251, 78 S. Ct. at 1238.

II.

With these principles of law in mind, we turn to the facts of this particular case. These facts have already been set out with meticulous care in the opinion of Judge Dooling, and need not, therefore, be repeated here in detail. His findings are clearly supported by the record. In determining whether Peerless (P. R.) had business contacts with New York of such a nature and extent as to warrant the conclusion that it was "present" or "doing business" here, Judge Dooling evaluated the relationship between the Puerto Rican corporation and its New York parent, Peerless, as well as between that corporation and its president, who resides in New York.

Judge Dooling found, and we agree, that

> "Peerless (P. R.) is in no sense a department or agency of Peerless New York. Its business is distinct in composition and location and it has its own operating personnel. * * * Equally, it does not appear that Peerless New York was the agent or im-

> plement of Peerless (P. R.). The parties were free to choose their forms of doing business with each other and there is no indication that they violated the integrity of the forms they chose or rendered them unreal by any course of conduct shown in the evidence."

Although Peerless (P. R.) was in effect wholly owned by Peerless of New York, the evidence is quite clear that the relationship of the New York corporation to the Puerto Rican corporation was primarily that of seller to purchaser, and not that of puppeteer to puppet. Peerless (P. R.) purchased property and erected its plant in Ponce, Puerto Rico, for the purpose of marketing and distributing chemicals and petroleum products. The New York corporation had been doing a similar business since 1945. Peerless made no loans to Peerless (P. R.), guaranteed none of its obligations, and underwrote none of its liabilities. Peerless is one of several suppliers of chemicals to Peerless (P. R.), supplying it with 10% of its purchases by tonnage and 30% in dollar value, and charging the same price charged all other purchasers. Orders are sent by Peerless (P. R.) from Puerto Rico to all suppliers and invoices are paid by checks drawn on its Puerto Rican bank. Marketing of its products is solely by local solicitation in Puerto Rico. Peerless (P. R.) pays no taxes to the State of New York, has no employees here, no telephone listing here, and is not authorized to do business here.[2]

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[2] It is difficult to overlook the striking similarity between the facts of this case and the facts in A. G. Bliss Co. v. United Carr Fastener Co., 116 F. Supp. 291 (D. Mass. 1953) (dismissal for lack of jurisdiction over Canadian corporation), affirmed on the opinion of the District Judge, 213 F. 2d 541 (1st Cir. 1954).

In this case, we do not have a foreign corporation which "buys merchandise, in a systematic and continuing fashion, through an exclusive purchasing agent with an established and permanent place of business in New York,"[3] Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., 299 N. Y. 208, 212, 86 N. E. 2d 564, 566, 12 A. L. R. 2d 1435 (1949), or an employee group soliciting sales on a regular basis, see International Shoe Co. v. Washington, supra; Jaftex Corp. v. Randolph Mills, Inc., 282 F. 2d 508 (2d Cir. 1960); Nash-Ringel, Inc. v. Amana Refrigeration, Inc., 172 F. Supp. 524 (S. D. N. Y. 1959); Ronson Art Metal Works, Inc. v. Brown & Bigelow, Inc., 104 F. Supp. 716 (S. D. N. Y. 1952), or a firm within the forum state which performs for the foreign corporation such an overwhelming portion of its business that the latter "has achieved most of the advantages which would accrue if the corporation performed the activity itself," see Note, 104 U. of Pa. L. Rev. 381, 402 (1955)—factors which singly or in combination might justify the exercise of jurisdiction over a foreign corporation.

The appellants refer us to cases in which the parent corporation has been held subject to the jurisdiction of another state because of the activities there of its subsidiary, see, e. g., State of Maryland for use of Mitchell v. Capital Airlines, Inc., 199 F. Supp. 335 (S. D. N. Y. 1961); and they urge, therefore, that the converse should hold

[3] It has long been settled that purchases alone, though carried on regularly, are not enough to confer jurisdiction upon the courts of the state in which the purchases are made. Rosenberg Bros. Co. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372 (1923); Hutchinson v. Chase & Gilbert, 45 F. 2d 139 (2d Cir. 1930).

true. In order to evaluate this argument, it is necessary to determine the rationale for the exercise of jurisdiction in appropriate cases over the parent of a local corporation, for we know that the mere existence of a parent-subsidiary relationship is not alone sufficient. See Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 336, 45 S. Ct. 250, 69 L. Ed. 634 (1925); Echeverry v. Kellogg Switchboard & Supply Co., 175 F. 2d 900, 903 (2d Cir. 1949). First, the parent's control over the subsidiary may be such that it is deriving considerable profit from the subsidiary's activities within the forum state; as we have already noted, the state's extension of protection to those activities may render it fair and reasonable that the parent submit to jurisdiction there. Second, control over the subsidiary and its personnel and records in the forum state may render it convenient for the parent to defend there. Jurisdiction over the parent therefore becomes unfair to the extent that the independence of the local subsidiary is a reality. See Note, 104 U. of Pa. L. Rev. at 403-06, and the cases there discussed. In the converse situation, which we have before us, Peerless (P. R.) is so much an effectively independent corporate entity—certainly not in a position conveniently to defend an action here—that to subject it to judicial process in the state of New York under the circumstances of this case would be to impose an unconstitutional burden.

III.

Appellants also contend that the activities in New York of president Dennis Carey rendered Peerless (P. R.) amenable to the jurisdiction of the District Court. We

find this contention without merit. The facts as amply set out by Judge Dooling reveal, in effect, that Carey, a resident of New York and president of both Peerless New York and Peerless (P. R.), remained here the greater part of the year but was in constant liaison with the Puerto Rican corporation. He decided, at the Long Island City offices of Peerless New York, questions of corporate concern, investigated into market and price conditions, sometimes signed checks drawn on the Puerto Rican bank account of Peerless (P. R.), and on a few occasions was the object of solicitation by certain manufacturers of chemicals. But he solicited no sales in New York and signed no contracts here in behalf of Peerless (P. R.). In short, the far greater proportion of Carey's activities in New York as president of the Puerto Rican corporation was related to *intra*-corporate affairs, rather than to business dealings with residents of New York, which seems to be one of the elements fundamental to the invocation of the "doing business" standard. See Hurley v. Wells-Newton Nat. Corp., 49 F. 2d 914, 919 (D. Conn. 1931) (Hincks, J.). The less the activities of a foreign corporation are devoted to systematic dealings with "outsiders" within the forum state, the less likely is it that the corporation has reaped benefits and protection from the laws of that state, and the less appropriate is the assertion of judicial jurisdiction. To hold otherwise would subject a foreign corporation to jurisdiction in any state in which its president, who we would expect to be constantly concerned with the well-being of his corporation, happens to reside. In the case before us, the day-to-day operations of the corporation, its dealings with other persons by pur-

chases, payments, solicitation, and sales, were all conducted in Puerto Rico, where its plant and employees were located. So too, in fact, were the greater number of "internal" functions, such as the holding of meetings of the board of directors, compare Pickthall v. Anaconda Copper Min. Co., 73 F. Supp. 694 (S. D. N. Y. 1947), the retention of the corporate books and records, the payment of salaries to all corporate employees.[4]

IV.

Thus, the nature and extent of the Puerto Rican corporation's business activities in New York—through its president and through its parent corporation—are insufficient to warrant subjecting it to the jurisdiction of courts sitting in this state. Despite this, there are cases, as we have already indicated, where jurisdiction may properly be exercised if the cause of action relates in some significant manner to the forum state or the business activities, however minimal, conducted in it, see International Shoe Co. v. Washington, 326 U. S. at 318, 66 S. Ct. at 159; Hanson v.

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[4] The most recent authoritative case cited to us by the appellants is the Supreme Court's decision in Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952). The Court there upheld the jurisdiction of an Ohio court, 155 Ohio St. 116, 98 N. E. 2d 33, over a Philippine corporation which was "carrying on in Ohio a continuous and systematic, but limited, part of its general business," while the Philippines were occupied by enemy troops. During the enemy occupation, the president of the corporation made Ohio, the base of his operations on its behalf. Directors' meetings were held in Ohio, the corporate bank accounts and business files were kept there, stock transfers were effected there, salaries paid and machinery purchased there. The differences between Perkins and the case before us are too clear to warrant further discussion.

Denckla, 357 U. S. at 251, 78 S. Ct. at 1238; especially if the injured party is a resident, see McGee v. International Life Ins. Co., 355 U. S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); Travelers Health Ass'n v. Virginia, 339 U. S. 643, 648, 70 S. Ct. 927, 94 L. Ed. 1154 (1950). In the case before us, injury was caused in Baltimore Harbor to the plaintiffs, all residents of Baltimore, Maryland, by the leakage of chlorine gas from cylinders supposedly emptied by Peerless (P. R.) in Puerto Rico and sent to Baltimore for refilling. The negligence charged by the plaintiffs was apparently lack of due care in Puerto Rico in removing the chlorine gas from the cylinders before shipment. In no way were the interests of New York, either qua governmental authority or qua protector of its residents, affected or impaired by the transaction on which suit is brought. The appellants tell us, however, that the cylinders were originally purchased from Peerless of New York, that it was named for convenience as consignor on the bills of lading when the cylinders plied their course between Baltimore Harbor and Puerto Rico and was designated in the arrival notice on the return trip. We believe this has no relevance to the plaintiffs' claim of injury. New York's contacts with the cause of action are far too tenuous to merit subjecting the foreign corporation to suit here.[5]

[5] We cannot help but note, in passing the increasing flexibility in the criteria set down in recent opinions for determining the jurisdictional question with which we are dealing. This has been mirrored —for much the same reasons, compare McGee v. International Life Ins. Co., 355 U. S. at 222-223, 78 S. Ct. at 200-201—by a similar erosion in the once formalistic doctrines of conflict of laws, see Pearson v. Northeast Airlines, Inc., 309 F. 2d 553, 563 (2d Cir.

(continued on page A28)

Opinion

We therefore affirm the orders of Judge MacMahon in the Southern District and Judge Dooling in the Eastern District vacating service upon Dennis Carey as president of Peerless (P. R.) and dismissing the complaint.

(continued from page A27)

1962), cert. denied, 372 U. S. 912, 83 S. Ct. 726, 9 L. Ed. 2d 720 (1963), and the development of rules for choice of law strikingly similar to those for determining the propriety of judicial jurisdiction, see Traynor, "Is This Conflict Really Necessary?", 37 Texas L. Rev. 657 (1959). This parallel development has not gone unnoticed by the Supreme Court. See Hanson v. Denckla, 357 U. S. at 253-254, and at 258, 78 S. Ct. at 1242, where Mr. Justice Black, dissenting, noted that "True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations." Although there are cases in which a state may properly exert its jurisdiction over a defendant even though it has little claim to the application of its law to the merits of the dispute, the sheer implausibility in the case before us of applying New York tort law to the Maryland accident fortifies us in denying jurisdiction in a federal court sitting in New York.

APPENDIX B

Statutory Provisions Cited and Quoted

28 U. S. C. §1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(c) For the purpose of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U. S. C. §1391 Venue generally

(a) A civil action wherein jurisdiction is found only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is

doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 U. S. C. §1404. Change of venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

RULES OF CIVIL PROCEDURE 28 U. S. C.
FOR THE
UNITED STATES DISTRICT COURTS

Rule 4. Process.

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading; whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process,—

THE UNITED STATES CONSTITUTION

Article III (U. S. C. Const. Art. III, Sec. 1 and 2.)

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Com-

pensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed: but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Statutory Provisions Cited and Quoted

THE UNITED STATES CONSTITUTION

Amendment V (1 Stat 97)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII (1 Stat 97)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV (14 Stat 358)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provision Cited and Quoted

28 U. S. C. A. §1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. C. A. §2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U. S. C. A. §1693. Place of arrest in civil action

Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court.

APPENDIX C

Conflicting Opinion

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY, 1963, TERM

Number 7266

HOUSTON FEARLESS CORPORATION,

Appellant,

vs.

GUY TETER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Before BREITENSTEIN, HILL and SETH, United State Circuit Judges.

HILL, Circuit Judge.

The appeal, under the provisions of 28 U. S. C. §1292(b), is from an interlocutory order of the lower court denying defendant-appellant's motions to quash the service of process and to dismiss the complaint for want of jurisdiction and upon the basis of improper venue or, in the alternative, for a change of venue pursuant to 28 U. S. C. §1404(a). The questions presented are whether, under the facts of

the case, defendant-appellant was doing business within the State and District of Colorado within the meaning of the venue provisions of 28 U. S. C. §1391(c), and, if so, whether as a matter of convenience, venue should be changed to another district under §1404(a).

The facts as found by the lower court and established by the oral testimony, affidavits, counter-affidavits and the answers to requests for admissions and interrogatories are not in dispute. These facts disclose that appellee, Teter, is a resident of the State of Colorado and the appellant, Houston Fearless Corporation (Houston), is a California corporation with its principal offices and place of business located in Los Angeles, California. Houston does not maintain any corporate office in Colorado and has never done so; it has never applied for authority, or been qualified, to do business in Colorado; it has never authorized or appointed an agent for service of process in Colorado, and it does not have, and has never had, any officer, agent or employee, except as herein disclosed a resident of Colorado. Houston is engaged in the manufacturing business and no part of such manufacturing activity is conducted in that state.

Houston, in 1960, was desirous of obtaining sales representation in the Denver, Colorado, and Salt Lake City, Utah, areas. It was especially interested in making sales of its products and services to the Martin Company in the Denver area. To that end, Houston entered into negotiations with Teter, who was then employed as a buyer by Martin, to become its sales representative in the States of Colorado and Utah. As a result of these negotiations, Teter termi-

nated his employment with Martin and entered into a written agreement with Houston[1] which became effective on November 7, 1960. This agreement, which could be terminated by either party upon 60 days written notice, referred to Teter as the "Representative" and covered "sales and engineering liaison services" to be performed by him in Colorado and Utah. Under the terms of the agreement, Houston agreed to pay Teter a commission at a specified rate based upon the dollar volume of sales made by him. Houston also agreed to pay him the sum of $400 per month as a retainer, plus expenses not to exceed $250 per month, or a total not to exceed $650 per month. However, the monthly retainer payment was to be deducted from the amount of commissions payable to him and, therefore, Teter's compensation for his services in securing purchase orders and developing markets and sales for Houston's products was on a commission basis even though he did receive a monthly retainer payment.

Teter's duties as Houston's representative were spelled out in considerable detail in the agreement. It provided that his duties should include but were not limited to: (1) Assisting Houston in obtaining sales leads and contracts; (2) assisting Houston in negotiating purchase orders and contracts; (3) providing adequate technical liaison both prior to and after receipt of an order and continuing such liaison until the items ordered were delivered and accepted;

[1] The agreement with Teter was actually entered into on appellant's behalf by Horkey-Moore Associates but Horkey-Moore is a division of Houston and a trade-name used by it. We will therefore refer to Houston as the contracting party.

(4) providing liaison with customers as might be required after delivery of any items so as to insure customer satisfaction and good-will; and (5) assisting Houston in resolving any problems as to payment or settlement by the customer for goods delivered or services performed.

This agreement was terminated by Houston as of June 30, 1961, and Teter thereafter commenced this diversity action to recover commissions allegedly due and owing to him under such agreement. Service of process was made upon an officer of appellant corporation by the United States Marshal, within the District of Colorado, pursuant to the provisions of F. R. Civ. P. 4 (d)(3), 28 U. S. C. A. The lower court in denying appellant's motions attacking the sufficiency of such service specifically found and held that Houston was doing business in Colorado within the meaning of 28 U. S. C. §1391(c), and that the service of process was proper and valid. The court concluded that the District of Colorado was the proper venue for the action and that it had jurisdiction. We allowed this interlocutory appeal. Houston Fearless Corporation v. Teter, 10 Cir., 313 F. 2d 91.

Appellant in its brief first argues that it was not doing business in the State of Colorado and therefore the lower court was without jurisdiction to entertain the action because venue was improper in the Colorado district. For the answer to this contention, we look to the federal venue statute, 28 U. S. C. §1391(c), which, insofar as pertinent here, provides as follows:

> "A corporation may be sued in any judicial district in which it * * * is doing business, and such

judicial district shall be regarded as the residence of such corporation for venue purposes."

The historical background of venue in the federal courts is interesting, but we will not unnecessarily extend the length of this opinion on it as there are several excellent discussions to be found elsewhere.[2] From an examination of these discussions, it is apparent that the questions of venue under §1391(c) and service of process under the various state statutes are so intertwined that it is difficult to separate the principles of law involved. Concededly, as to both questions, the courts must determine what constitutes "doing business".

Professor Moore, in recognizing the difficulties which are encountered in reaching an answer to our problem, states:

> "There is a good deal of confusion among the decisions as to the meaning of 'doing business,' as used in §1391(c), because of the following factors: the courts' use of the term 'doing business' in connection with venue and also with the amenability of the defendant corporation to service of process; whether this latter matter, at least in diversity cases, is governed by state law, subject to federal constitutional limitations; if it is governed by state law, does state law determine whether a corporation is 'doing business' for federal venue purposes; and because the Supreme Court has greatly broadened the rule as to when a corporation is amenable to

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[2] 1 Moore's Federal Practice, §0.142 [5.—3], pp. 1489-1503; 1 Barron and Holtzoff, Federal Practice and Procedure, §80, pp. 384-394; Cyclopedia of Federal Procedure, §§4.13, 4.14, pp. 29-39.

> service and in so doing has used other language than 'doing business.' We believe that the construction of §1391(c) involves a federal matter; that state law is not controlling; and uniformity in applying §1391(c) is desirable. And, although the matter is not free from doubt, and there is very respectable *contra* authority, we believe that if a corporation is amenable to services of process it should be held to be 'doing business' for venue purposes. • • •"[3]

We agree that federal law must be applied to determine whether Houston was "doing business" in Colorado for venue purposes,[4] and that the test of "doing business" is the same for that purpose as it is for determining whether a corporation is amenable to service of process. We may therefore look to the meaning and content generally accorded to the term "doing business" in cases involving the question of whether the service under a state statute comports with due process. The landmark case on this subject is, of course, International Shoe Co. v. Washington, 326 U. S. 310. In that case the Supreme Court said at page 316:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. • • • But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process

[3] 1 Moore's Federal Practice, §0.142 [5—3], pp. 1497-1500.

[4] See also Jattex Corporation v. Randolph Mills, Inc., 2 Cir., 282 F. 2d 508.

> requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' * * *"

And, further, at page 317:

> "'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on even though no consent to be sued or authorization to an agent to accept service of process has been given. * * * Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. * * * To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."

This court, in Steinway v. Majestic Amusement Co., 10 Cir., 179 F. 2d 681, cert. denied, 339 U. S. 947, followed the test laid down by International Shoe, stating at pages 682 and 683:

> "While leaving every case to its own facts, it is generally understood that to constitute 'engaging in or transacting business' in a state, so as to be found or present there for purposes of personal service, a nonresident corporation's activity there must be

> 'substantial', 'continuous', and 'regular', as distinguished from 'casual', 'single', or 'isolated' acts. * * *"[5]

This test was again applied by this court in the recent case of Curtis Publishing Company v. Cassell, 10 Cir., 302 F. 2d 132. Judge Breitenstein in his opinion stated at page 136:

> "We believe that International Shoe is controlling and that the instant controversy must be resolved by the application of the principles there announced. Those principles are stated as conclusions and do not provide the criteria required to sustain themselves. We followed International Shoe in Steinway v. Majestic Amusement Co., 10 Cir., 179 F. 2d 681, 682-684, 18 A. L. R. 2d 179, certiorari denied 339 U. S. 947, 70 S. Ct. 802, 94 L. Ed. 1362 and there said that, leaving every case to its own facts, to constitute doing business a nonresident corporation's activities must be substantial, continuous, and regular as distinguished from casual, single, or isolated. We shall apply these standards here."

So, here, the principles of International Shoe are controlling and the question of whether Houston was "doing business" in Colorado for venue purposes must be resolved by application of such principles. When these principles are applied to the facts in this case, we believe it is clear that Houston was "doing business" in Colorado.

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[5] Citing, International Shoe Co. v. Washington, supra; Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516; 18 Fletcher Cyclopedia Corporations, §§8711, 8713, 8715.

Conflicting Opinion

The facts show that in pursuance of his duties under the agreement, Teter contacted Martin in an effort to promote an arrangement whereby Houston would be qualified to submit bids for the sale of its products to Martin. It appears that Martin's practice was to purchase its required materials and equipment by inviting various suppliers to make bids and only those suppliers who had been determined by Martin to be qualified were invited to submit such bids. After a bid was accepted by Martin a contract was awarded to the successful bidder. As a result of Teter's efforts and after a physical survey of Houston's facilities was made and furnished to Martin, Houston was placed on Martin's list of qualified bidders. Thereafter, Houston received invitations to make bids and numerous contracts or purchase orders were awarded to it providing for the supplying of certain products and services. These contracts or purchase orders provided for the delivery of the products manufactured by Houston at points in California, with exceptions in two instances, where goods were delivered and services were performed by Houston in Denver, Colorado.

The facts also show that, regardless of the careful and guarded language used in the agreement to describe appellee's duties, he was actually a soliciting agent for Houston and, as such, endeavored at all times during the term of the agreement to get as much business as possible for his principal from Martin and others within his territory. He was successful in his efforts and secured a considerable amount of business from Martin. Under the purchase order arrangement, some 89 contracts or purchase orders were entered into that year involving many hundreds of thou-

sands of dollars. Of this amount, over $400,000 worth of the equipment and services purchased by Martin from appellant was used in Colorado.

In addition, Teter assisted appellant in obtaining applicable bid specifications; he provided technical liaison between Martin and appellant, both prior to and after receipt of a purchase order; and he attempted to obtain more invitations to bid on behalf of appellant by interviewing personnel at Martin. In doing this work, Teter spent approximately four days a week interviewing and consulting with Martin personnel at the Denver plant. In addition to these activities by Teter on behalf of Houston, several of its officers, officials and technicians made various trips to Martin's Colorado plant in connection with legal and technical problems arising out of the purchase orders issued by Martin to it and out of the equipment furnished under such purchase orders. Some of these officers made as many as three trips to Colorado during 1960 and 1961, and several technicians made one trip each. At one time, in 1961, four of appellant's employees made a trip to Colorado to rework equipment and correct technical manuals. One other highly significant fact is that each of the purchase orders contained a provision that "This Contract shall be governed by, subject to, and construed according to the laws of the State of Colorado. The Contractor will comply with all applicable Federal, State and local laws."

We are unable to say on the basis of these facts that Houston's contacts with the territory of the forum were so minimal that the maintenance of this suit in that forum

would offend "traditional notions of fair play and substantial justice." On the contrary, its activities in the state were "substantial", "continuous" and "regular" as distinguished from "casual", "single" or "isolated" acts and gave rise to the liabilities sued upon here.

In further support of its position that it was not "doing business" in Colorado, appellant points out that its corporate officer, upon whom service was made, was only in the state for a single day and that, after the termination of the agreement with Teter, it did not maintain an office, employee or representative in the state. This is true but it is hardly controlling here. "A foreign corporation which has ceased to do business in a state is still subject to service of process in suits on causes of actior which arose out of business carried on by the defendant in the state."[6]

Appellant's last argument is that the lower court erred in denying its motion to transfer the action from the District of Colorado to the appropriate District in the State of California, pursuant to 28 U. S. C. §1404(a).[7] We do not agree. The burden of establishing that the suit should be transferred is on the moving party[8] and unless the balance is strongly in favor of a defendant, the plaintiff's choice of

[6] Electrical Equipment Company v. Hamm, 8 Cir., 217 F. 2d 656, 663, and authorities therein cited.

[7] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[8] 1 Moore's Federal Practice, §0.145[5], p. 1777.

forum should rarely be disturbed.[9] The exercise of this power is committed to the sound discretion of the trial court in the light of all the circumstances of the case and its judgment will be reversed only where the appellate court finds there has been an abuse of discretion.[10] We can find no such abuse of discretion in this case.

AFFIRMED.

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[9] Gulf Oil Corporation v. Gilbert, 330 U. S. 501; Chicago, Rock Island & Pacific R. Co. v. Hugh Breeding, Inc., 10 Cir., 232 F. 2d 584; Headrick v. Atchison, T. & S. F. Ry. Co., 10 Cir., 182 F. 2d 305.

[10] Chicago, Rock Island & Pacific R. Co. v. Hugh Breeding, Inc., 10 Cir., 247 F. 2d 217, appeal dismissed, 355 U. S. 880; Chicago, Rock Island & Pacific R. Co. v. Hugh Breeding, Inc., 10 Cir., 232 F. 2d 584.